Filed 2/16/05 P. v. Hatcher CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK HATCHER,

Defendant and Appellant.

F045239

(Super. Ct. No. BF104608A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Linda J. Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Susan J. Orton, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Derrick Hatcher pled no contest to kidnapping Rhonda Storey. He contends he should be allowed to withdraw his plea because the trial court erred when it

[*] Before Vartabedian, Acting P.J., Cornell, J. and Gomes, J.

based its finding of a factual basis on a stipulation by counsel. Hatcher claims the finding is insufficient under Penal Code section 1192.5. [1] We agree but conclude the error was harmless and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

We learn the facts from the summary of the police reports contained in the probation report.

Hatcher and Storey had been living together approximately one month when, in December 2003, Hatcher threatened to hurt and kill her. He then forced her at knifepoint to drive them to a 7-Eleven where they parked. He refused to allow her to get out of the car. When eventually he fell asleep, Storey got out of the car and called police. She was distraught as she described the events to the police. Hatcher denied doing anything wrong and indicated he was too intoxicated to remember all the events clearly.

Two days later the district attorney charged Hatcher in a complaint with three crimes, including a violation of section 207, subdivision (a). The complaint also alleged three felony convictions and prison terms.

On the day of the scheduled pre-preliminary examination, January 12, 2004, the prosecutor added a strike prior to the complaint. Hatcher then entered into a plea bargain. He pled no contest to violating section 207, subdivision (a), and admitted the strike prior. The remaining charges and allegations were dismissed. In exchange for the plea, Hatcher would be sentenced to no more than six years in prison (low term doubled).

While going through the normal advisement of rights and waivers before the entry of the plea, the trial court inquired of counsel as follows:

"THE COURT: Will you stipulate to a factual basis for the plea?

"[DEFENSE COUNSEL]: So stipulated.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

"[PROSECUTOR]: So stipulated.

"THE COURT: I will make a finding there's a factual basis for the plea based on the stipulation."

Prior to sentencing, Hatcher unsuccessfully moved through new counsel to set aside his plea. The trial court sentenced him to six years in prison in accord with the plea bargain.

DISCUSSION

Hatcher argues here that the trial court failed to establish a sufficient factual basis for his no contest plea under section 1192.5. We agree with Hatcher, but conclude the error was harmless and affirm the judgment.

The Supreme Court has provided guidance to us with its recent decision in *People v. Holmes* (2004) 32 Cal.4th 432 (*Holmes*). With a procedural history very similar to what we have here, the court concluded the reference to the facts as alleged in the complaint was sufficient to provide a basis for accepting the plea and complying with the requirements of section 1192.5. In its analysis the court sets forth clearly what a trial court should do to comply with section 1192.5 and our approach in reviewing the trial court's actions.

The Section 1192.5 Standard

Section 1192.5 requires a trial court, when approving a conditional plea, to "cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." This is a statutory requirement and is not based on a fundamental constitutional right.

"The purpose of the requirement is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged. [Citation.] Inquiry into the factual basis for the plea ensures that the defendant actually committed a

crime at least as serious as the one to which he is willing to plead." (*People v. Watts* (1977) 67 Cal.App.3d 173, 178 (*Watts*).)

The factual basis found by the trial court does not have to resolve all contradictory evidence or provide proof of guilt beyond a reasonable doubt. It is sufficient if it corroborates what the defendant already admits. (*Watts, supra,* 67 Cal.App.3d at p. 179.) It does not require more than establishing a prima facie factual basis for the charges. This is so even if the defendant later contests his guilt. (*Holmes, supra,* 32 Cal.4th at pp. 442-443.)

Holmes describes the duty of the trial court as follows:

> "In sum, we conclude that the trial court must garner information regarding the factual basis either from the defendant or defense counsel. If the trial court examines the defendant regarding the factual basis for the plea, the court may have the defendant describe the conduct that gave rise to the charge [citation], or may question the defendant regarding the detailed factual basis described in the complaint or written plea agreement. [Citation.] If the trial court inquires of defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.]" (*Holmes, supra,* 32 Cal.4th at p. 442.)

Standard of Review

The Supreme Court has set forth clearly that the trial court retains broad discretion to determine whether there is a sufficient factual basis. The decision of the trial court will be reversed only if there is an abuse of that discretion. If there is error, it is harmless where the contents of the record support a finding of a factual basis for the conditional plea. (*Holmes, supra,* 32 Cal.4th at p. 443.)

The Application of the Section 1192.5 Standard in this Case

In *Holmes* the trial court inquired of the defendant whether he did what was alleged in the complaint. He said that he did. The Supreme Court concluded that the trial court had met its duty under section 1192.5 by inquiring of the defendant and referring to

the complaint. The complaint in Holmes's case, which was relatively simple, stated the date, name of the victim, and a brief description of the facts.

Here, there is only a stipulation by counsel. While the Supreme Court expressly did not decide the sufficiency of a bare stipulation, it indicated a preference for a broader inquiry by the trial court and referred to a dissenting opinion in the one case that affirmed the practice. (*Holmes, supra,* 32 Cal.4th at p. 441, fn. 8, citing *People v. McGuire* (1991) 1 Cal.App.4th 281, 286 (dis. opn. of Poché, J.).)

We disagree with the majority in *McGuire* and conclude that a bare stipulation by counsel does not meet the section 1192.5 standard. We think the clear directions from this court in *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1577, which were adopted by the Supreme Court in *Holmes*, require more from the trial court than occurred here. Thus, we conclude the trial court here abused its discretion.

We now look to the contents of the record to determine whether the error is harmless. The complaint contains the date, name of the victim and a brief description in statutory terms of the events. Under *Holmes* this would be sufficient. But, we have more. The probation report, which is referred to above, contains an extensive summary of the police reports.

Hatcher argues that his claims of innocence after the entry of his no contest plea make the contents of the probation report insufficient. Not so. The Supreme Court in *Holmes* held that claims of innocence are not relevant to an inquiry under section 1192.5. (*Holmes, supra,* 32 Cal.4th at p. 443.)

We conclude the record here is more than sufficient to meet the section 1192.5 standard, hence the error is harmless.

DISPOSITION

The judgment is affirmed.